1957

State of Utah v. Keith Winget : Brief of Defendant and Appellant

Utah Supreme Court

J. Vernon Erickson; Attorney for Defendant and Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent

vs.

KEITH WINGET,

Defendant and Appellant

Criminal No. 8630

BRIEF OF DEFENDANT AND APPELLANT

Appeal from the Sixth Judicial District Court of the State of Utah, in and for the County of Sevier,

Honorable John L. Sevy Jr., Judge.

J. VERNON ERICKSON,
Attorney for Defendant and Appellant.

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TEXTS

The defendant by the Information in this action was charged with the commission of the crime of rape, upon his 8 year old daughter Cynthia Winget. The action was tried in Sevier County, Utah, on November 26 and 27th, 1956. On November 27, 1956 the Jury returned a verdict of guilty, and on December 10, 1956, Motion for New Trial was denied and defendant was sentenced to 20 years imprisonment in the Utah State Penitentiary. He appeals.

STATEMENT OF FACTS

Cynthia Suzanne Winget is the 8 year old daughter of defendant and his former wife, Marjorie L. Winget. She testified that on Sunday September 2, 1956, she and her two brothers went to visit her father, the defendant, at their grandfather's home. The defendant was alone in the home and that while her two younger brothers were outside playing, her father had improper relations with her. She didn't relate this to her mother until the following Monday evening when she noticed a bleeding and her mother took her to a doctor for an examination the following Tuesday. (T 6-14).

Dr. Gaylord Buchanan testified that he performed a pelvic examination on the child and found no active bleeding at that time but evidence of abrasion and of the tear or laceration at the base of the hyman was still present (T p 52-53). The doctor stated that it was quite probable that this injury could have been caused by a male penis. (T p 54) but on cross examination agreed that it could have been caused by several things within his realm of speculation (T p 56).

The prosecution as part of its case in chief called as a witness Marlene Johnson, a half sister of Cynthia Suzanne Winget, who testified that in about 1948 and 1949 when she was between 8 and 9 years of age and while her mother was

married to the defendant, that on one occasion during the summer the defendant raped her, and on another occasion in the summer of 1950 at Boulder Mountain, Utah, when she was between 9 and 10, the defendant again raped her. (T p 39-40-41-42) and that he did so again in 1952 when she was 12 (T 42-43) and also repeated the act a month later (T p 44). The admission of this testimony was objected to by counsel for defendant, but the objection was overruled by the Court (T p 38 and 39). The witness Marlene Johnson, was at the time of the trial, 17 years of age. (T p 37). She testified she did not relate these incidents to her mother until just before her mother and the defendant were divorced (T p 46) which was in 1952 (T p 31).

The defendant, Keith Winget took the stand in his own behalf and denied that he had ever raped Cynthia Suzanne or Marlene or had improper relations with them (T p 65-66). He testified he and his former wife were divorced in 1952 (T p 59).

STATEMENT OF POINTS

POINT I. THE VERDICT IS CONTRARY TO LAW AND THE EVIDENCE.

POINT II. THE COURT ERRED IN ADMITTING TESTIMONY AND EVIDENCE OF A SIMILAR OFFENSE COMMITTED BY DEFENDANT, PRIOR IN TIME TO THE DATE ON WHICH THE CRIME CHARGED IN THE INFORMATION WAS ALLEGED TO HAVE BEEN COMMITTED, WITH A DIFFERENT PARTY.

POINT III. THE COURT ERRED IN CHARGING THE JURY AS PER HIS INSTRUCTION NO. 9.

POINT IV. THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL.

ARGUMENT

POINT I. THE VERDICT IS CONTRARY TO THE LAW AND THE EVIDENCE.

POINT II. THE COURT ERRED IN ADMITTING TESTIMONY AND EVIDENCE OF A SIMILAR OFFENSE COMMITTED BY DEFENDANT, PRIOR IN TIME TO THE DATE ON WHICH THE CRIME CHARGED IN THE INFORMATION WAS ALLEGED TO HAVE BEEN COMMITTED, WITH A DIFFERENT PARTY.

Because Point I and Point II are very closely connected and because defendant contends the verdict rendered was contrary to law by reason of the improper admission of the testimony of Marlene Johnson, which, in a case such as this where a man is tried for a crime so heinous and base that it inflames the minds of even the most prudent, this testimony could not have done otherwise than influence the jury in their verdict, defendant will present his argument under the first two points, together.

In this action in the State's case in chief the testimony of Marlene Johnson now of the age of 17 years, a half sister of the prosecutrix, was admitted over the objection of defendant was to the effect that the defendant had on four separate occasions, some 8 or 9 years ago, when the witness was between 8 and 9 years of age, and again when the witness was about 9 or 10 years of age, raped her. These incidents were wholly unconnected with the crime charged and such testimony should never have been admitted in evidence before the Jury.

It is a well settled rule of law that evidence of other and distinct crimes are generally inadmissible.

It is said in Underhill on Criminal Evidence, 3rd Edition, Chapter XV, Section 150:

"General rule regarding evidence of crimes other than that charged in the indictment. — The rule which requires that all evidence which is introduced shall be relevant to the guilt or the innocence of the accused is applied with considerable strictness in criminal proceedings. The wisdom and justice of this, at least from the defendant's standpoint, are self-evident. He can with fairness be expected to come into court prepared to meet the accusations contained in the indictment only, and, on this account, all the evidence offered by the prosecution should consist wholly of facts which are within the range and scope of its allegations. The large majority of persons of average intelligence are untrained in logical methods of thinking, and are therefore prone to draw illogical and incorrect inferences, and conclusions without adequate foundation. From such persons jurors are selected. They will very naturally believe that a person is guilty of the crime with which he is charged if it is proved to their satisfaction that he has committed a similar offense, or any offense of an equally heinous character. And it cannot be said with truth that this tendency is wholly without reason or justificaion, as every person can bear testimony from his or her experience, that a man who will commit one crime is very likely subsequently to commit another of the same description. To guard against this evil, and at the same time to avoid the delay which would be incident to an indefinite multiplication of issues, the general rule (to which, however, some very important exceptions may be noted) forbids the introduction of evidence which will show, or tend to show, that the accused has committed any crime wholly independent of that offense for which he is on trial. (Cases cited)****"

Among the cases cited are two Utah cases, namely:

State v. Baum, 47 Utah 7, 151 Pac. 518, in which it was held it was not proper to show convictions of prior offenses to prove probabilities that the defendant was guilty of the charged offense, or to show criminal propensities. In this case the District Attorney attempted to prove prior convictions in his main case.

State v. Williams, 36 Utah 273, 103 Pac. 250, wherein it was held in a prosecution for rape it was reversible error for the state on cross-examination of the accused to compel him over objection to answer questions conveying the idea that he had permitted other children to call at his home in order that he might ravish them. And in the opinion written by Justice McCarty in this case he said, reading from page 252 of the Pacific Reporter:

> "The authorities uniformly hold in this class of cases that where a defendant is on trial for a particular crime evidence that he on some other occasion commited a separate and distinct crime wholly disconnected from the crime charged on some person other than the one mentioned in the information or indictment is never admissible. 'Proof of a distinct substantive offense is never admissible unless there is some logical connection between the two from which it can be said that proof of the one tends to establish the other. Thus in a prosecution for rape testimony would not be competent that at a time not comprehended within the res gestae the defendant had committed a rape on another woman.' Gillett, Ind. & Co., Ev. No. 57****The same general question was involved in the case of State v. Hillberg, 22 Utah, 27, 61 Pac. 215. Mr. Justice Miner, speaking for the court, said: 'The general rule in criminal cases, subject to exceptions, is well settled that, where one specific offense is charged, the commission of other offenses cannot be proven for the purpose of showing that the defendant would have been more likely to have committed the offense for which he was on trial, nor as corroborating the testimony relating thereto; etc.' "

In line with this is the more recent case of People v. Asavis, a California case reported in 71 Pac. 2, 307, in which it was held that evidence of the commission of other similar acts by defendant with persons other than the prosecutrix are inadmissible, where defendant denied that any improper act had taken place and no issue of innocent intent was in-

volved. Justice Houser in his opinion under paragraph 4, page 309 of the Paficic Reporter, says:

> "From a practical standpoint he (the defendant) is helpless under such an accusation, with the result that his conviction usually follows. It is for such and similar reasons that the courts are so hesitant about admitting, **especially in the case in chief,** evidence of the commission by defendant of other offenses of a nature similar to that of which the defendant has been charged. Even in criminal cases other than those which involve sexual relations, the ordinary rule is applied, and is the result of recognition of the fact that prejudice to the defendant may, and usually does, follow from evidence that at some time in the past he has committed some other felony. Like most rules, that rule has its exceptions. But where no exceptions to the general rule is applicable, the courts have unhesitatingly announced that for a violation of such rule a new trial must be granted."

Other recent cases in point are: People v. Wertz, 302 Pac. 2nd, 613, and People v. Buchel 296 Pac. 2nd, 113.

In Volume 16 of Corpus Juris, at page 610, the rule is thus stated:

> "Evidence of assaults by defendant upon, or acts of intercourse with, persons other than the prosecutrix is not admissible, unless they are parts of the same transaction; or unless statements in respect thereto are so connected in a confession with statements pertaining to the offense charged that it is impossible to exclude part of the confession without excluding all of it; or unless, according to some cases, defendant by his own testimony or otherwise claims an innocent intent."

And in the instant case, the testimony objected to does not fall within any of the exceptions noted and was therefore erroneously admitted and could not have done otherwise than constitute a vital element in the minds of the jury and influenced its verdict, and as a result the defendant did not have a fair and impartial trial to which he was entitled.

POINT III. THE COURT ERRED IN CHARGING THE JURY AS PER HIS INSTRUCTION NO. 9.

The Court instructed the Jury under its Instruction No. 9 as follows:

> "You have heard evidence of conduct of the Defendant, prior in time to the date on which the crime charged in the Information is alleged to have been committed, similar in nature to the offense charged in the information.
>
> You are instructed that if you find and believe beyond a reasonable doubt that such other acts were in fact committed by the defendant, such evidence is admissible for the sole purpose of showing a system, plan, and scheme of the defendant and to prove the lustful and lascivious disposition of the defendant and as having a tendency to render it more probable that acts of sexual intercourse charged in the information were committed on or about the date alleged, and for no other purpose."

This instruction is contrary to the law and it was error for the Court to admit such evidence and to instruct the jury that it was admissible to show the criminal propensities of defendant, contrary to the decision of our Court in the case of State v. Baum, 47 Utah 7, 151 Pac. 518, in which it was held it was not proper to show convictions of prior offenses to prove probabilities that the defendant was guilty of the charged offense, or to show criminal propensities. Said instruction should not have been given as it only served to add to the prejudicial effect of the evidence that should not have been admitted.

POINT IV. THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL.

For all of the reasons set forth above, defendant contends the lower Court committed error in denying the mo-

tion of the defendant for a new trial, and that for the reasons submitted herein the verdict of the jury should be reversed.

Respectfully submitted,

J. VERNON ERICKSON,

Attorney for Appellant.